IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

LONG CAUSE SUIT NO. 1878 OF 1979

Messrs Flowfast Engineers (India), a)
partnership firm, registered under)
the Indian Partnership Act having)
their place of business at 611,)
Dalamal Chambers, 6th floor,)
New Marine Lines, Bombay 400 002.)..Plaintiffs

Versus

1. M/S. D & H Secheron Electrodes)
Pvt.Ltd., a private limited)
company incorporated in India)
under the Companies Act, 1956)
having their registered office)
at 44-46, Industrial Estate,)
Killa Maidan, Indore 452 006)
in State of Madhya Pradesh and)
also carrying on business in)
Bombay having their office at)
Merchant Chambers, Sir)

Vithaldas Thakersey Marg,)
Bombay - 400 020.)

2. M/S. Dalamal & Sons investment)
Co., a partnership firm carrying)
on business at Merchant Chambers,)
41, Sir Vithaldas Thakersey Marg,)
Bombay 400 020.)

3. Nari Dalamal of Bombay Indian)
Inhabitant carrying on business)
at Merchant Chambers, 41 Sir)
Vithaldas Thakersey Marg,)
Bombay 400 020.)

4. M.D.Kripalani of Bombay Indian)
Inhabitant, Manager of 2nd)
Defendant carrying on business)
at Merchant Chambers, 41, Sir)
Vithaldas Thakersey Marg,)
Bombay 400 020.)

5. Jhamandas H. Melwani of Bombay)
Indian Inhabitant, the Chairman)
of the 1st Defendant carrying)
on busiess at Merchant)
Chambers, Sir Vithaldas)

Thackersey Marg, Bombay 400 020.)..Defendants

Mr. R.C. Shah with Ms. Mili Thakkar & H.J.Engineer i/b M/s. Gordhandas & Fozdar for Plaintiffs.
Mr. S.J.Thakkar with D.J.Kakalia, Ms. Bhavana Singh & Ms. Puja Jain i/b. M/s. Mulla & Mulla & Craigie Blunt & Caroe for Defendant No.1.

CORAM: S.K.SHAH,J.

JUDGMENT RESERVED ON: 28.1.2005
JUDGMENT PRONOUNCED ON 04.2.2005

ORAL JUDGMENT :

1. The Plaintiffs filed this suit for specific performance of the oral agreement dated 30.11.1977 for purchase of Basement-cum-godown premises as described in Exhibit "A" annexed to the Plaint.

2. The Plaintiffs are a partnership firm. They are carrying on business as manufacturers of and dealers in engineering goods. The defendantg nO.1 is a Private Limited Company. Defendant No.2 is a partnership firm. Both Defendants Nos. 1 and 2 are carrying on their business in the premises situate in Merchant Chambers, 5th Floor, Vithaldas Thakersey

Marg, Mumbai 400 020. The business of the Defendant No.1 Private Company is as manufacturer of Electrodes and other allied articles. The business of the Defendant No.2 partnership firm is as Financiers and Builders. The Defendant No.3 is one of the Directors of the Defendant No.1 Company and also one of the partners of the Defendant No.2 firm. The Defendant No.4 is the Manager of the Defendant No.2 firm and Defendant No.5 is one of the Directors of the Defendant No.1 Company.

3. In the year 1974, the Plaintiffs had purchased on ownership basis from the Defendant No.2 firm the Dalamal Chambers flat. Since then, the Plaintiffs are known to the partners of Defendant No.2.

4. Messrs Harishlal T. Bhatia, Manoharlal T. Bhatia and Kumari Sundari T. Bhatia are the partners of the Plaintiffs' firm.

5. It is alleged by the Plaintiffs that somewhere in November, 1977, the Plaintiffs learnt that the Defendant No.1 Company were interested in selling the Basement-cum-Godown as described in Exhibit "A" annexed to the Plaint (hereinafter referred to as "the suit premises"). Since the Plaintiffs were interested in the suit premises, they approached the Defendant

No.1 through the Defendants Nos. 2, 3 and 4. The Defendants Nos. 3 and 4 expressed their willingness to sell the suit premises to the Plaintiffs on behalf of the Defendant No.1. They however, requested the Plaintiffs' partner, Harishlal Bhatia, to meet Defendant No.5 who was the Director of the Defendant No.1 Company for the purpose of finalising the terms and conditions of the sale. Accordingly, the Plaintiffs' partner, Harishlal Bhatia, requested the Defendants Nos. 3 and 4 to arrange a meeting with the Defendant No.5 which eventually was arranged on 30.11.1977. The meeting was held in the office of the Defendants Nos. 1 and 2. The said meeting was attended by Harishlal Bhatia and Manoharlal Bhatia on behalf of the Plaintiffs' firm and by Defendants Nos.4, 4 and 5 and one R.T.Sharma, Accountant of the Defendant No.2 firm. At the said meeting after negotiation, agreement was concluded between the two Plaintiffs' partners and the Defendants Nos. 3, 4 and 5 representing Defendant No.1. As per the said agreement, the Plaintiffs alleged, the Defendant No.1 Company agreed to sell the suit premises to the Plaintiffs for consideration of Rs.8,85,000/-. Rs.3,00,000/- were agreed to be paid in cash prior to the execution of the agreement and the balance amount was agreed to be paid on or before the execution of the formal agreement of sale. The Plaintiffs further

alleged that the Defendants Nos.3, 4 and 5 represented to the Plaintiffs that the suit premises was standing in the name of the Defendant No.1 Company in the records of the said Co-operative Society Ltd.; that the suit premises would be transferred to the Plaintiffs free from all encumbrances; that the Plaintiffs would be put in possession of the suit premises; that the Plaintiffs would be put in possession of the suit premises; that the necessary Municipal taxes, property taxes and other outgoings in respect of the suit premises would be cleared by the Defendant No.1 Company before the execution of the agreement for sale; that the Defendants Nos. 3, 4 and 5 would procure necessary "No Objection Certificate" from the said Society for the transfer of the suit premises in favour of the Plaintiffs as also to get transferred the shares of the said Society in favour of the Plaintiffs; that the Defendants Nos. 3, 4 and 4 assured that an agreement for sale of the property would be duly entered into by them on behalf of Defendant no.1 as soon as they were able to procure No Objection Certificate from the Dalamal Premises Co-operative Society Ltd.

6. The Plaintiffs further alleged that relying upon the aforesaid representations, assurances and promises, the Plaintiffs' partners on the same day

i.e. 30.11.1977, paid to the Defendant No.5 a sum of Rs.2,00,000/- in cash by way of earnest money in the presence of the Defendants Nos. 3 and 4 and the said R.T.Sharma, the Accountant of Defendant No.2. The Plaintiffs therefore alleged that the deal in respect of the purchase and sale of the suit premises was completed on the aforesaid terms. The Plaintiffs further alleged that a further sum of Rs.1,00,000/- was paid by Manoharlal Bhatia, the Plaintiffs' partner, to Defendant No.5 on 28.12.1977 in the presence of the Defendant No.4 and Mr. R.T.Sharma.

7. The Plaintiffs further alleged that in January, 1978, Defendants Nos. 3, 4 and 5 informed the Plaintiffs that they had already approached the said Co-operative Society for the purpose of getting No Objection Certificate and asked Harishlal Bhatia to pay a further sum towards the agreed consideration. Accordingly, on 3.1.1978, the Plaintiffs handed over to the Defendants Nos. 3, 4 and 5 a Bank Draft for Rs.1,00,000/-. However, the Defendants represented to the Plaintiffs that the Municipal Corporation was not agreeable to use the suit premises as godown, but they were pressing to use the suit premises for the purpose of parking. As such, the Bank Draft of Rs.1,00,000/- was no encashed. They further alleged that during the subsequent meeting, the Defendants Nos. 3, 4 and 5

along with their Counsel had a meeting with the Plaintiffs' partners wherein they agreed to somehow get the permission of the B.M.C. for using the suit premises as godown. On 30.10.1978, on the demand being made by Defendant No.5, two Bank Drafts, one for Rs.75,000/- and another for Rs.2,25,000/- aggregating to Rs.3,00,000/- were handed over by Harishlal Bhatia to Defendant no.5 towards the agreed consideration. However, the Defendant No.5 fell ill and was admitted in Breach Candy Hospital for treatment and, therefore, the said two Demand Drafts were not encashed and came to be returned to the Plaintiffs. After the Defendant no.5 recovered from illness and started attending the office, the Plaintiffs' partner, Harishlal Bhatia contacted him and requested for completing the transaction of sale. The Defendant No.5 then insisted that the Plaintiffs should pay the balance consideration of Rs.5,85,000/- immediately so that the transaction could be finalised. It is alleged that at that time, the Defendant No.5 had asked the Plaintiffs to retain the amount of Rs.3,00,000/- for clearing Municipal dues and other outgoings. However, the Plaintiffs issued six cheques of the different amounts aggregating to Rs.5,85,000/- and handed them over to the Defendant No.5. The said cheques were duly accepted by the Defendant No.5 from Harishlal Bhatia promising to complete the transaction.

8. The Plaintiffs however, alleged that inspite of having made payment of full consideration, the Defendant No.1 failed and neglected to carry out their part of the contract of executing the agreement of sale. Finally, the Plaintiffs addressed a letter dated 29.6.1979 addressed to the Defendant no.5 requiring him to refund the amount of Rs.3,00,000/- which were paid as earnest money. After receipt of the said letter, the Plaintiffs alleged, the Defendant No.5 called the partners of the Plaintiffs and requested to bear with him and he assured the Plaintiffs' partners that Defendant no.1 would definitely carry out their part of the contract of selling the suit premises to the Plaintiffs. However, the Defendants failed and omitted to execute formal agreement of sale and, therefore, the Plaintiffs filed the suit for specific performance of the agreement for sale of the suit premises. In the alternative, they claimed refund of earnest money of Rs.3,00,000/- with interest and a charge to be kept on the suit premises.

9. The Defendant No.1 Company resisted the suit by the Written Statement dated 30.1.1995. While denying the entire allegations of the Plaintiffs with regard to the concluded agreement of sale of the suit premises with the Defendant No.1, they contended that

none of the Defendants Nos. 3 to 5 had authority to enter into such agreement on behalf of the Defendant No.1 Company which is required as per the provisions of Section 46 of the Companies Act. They further contend that the Defendant No.1 Company was owned by two families viz. the Melwani Family and the Dalamal Family and two members of each family were Directors. They contend that H.H.Melwani was the Managing Director and J.H.Melwani, Defendant No.5,was the Director representing Melwani family and the other two Directors were Nari Dalamal and Hiranand Hassamal, both directors representing the Dalamal Family. The suit premises being the property of the Defendant No.1 Company could be sold only with due authority from the Board of Directors which consisted of these four Directors. The 2nd Defendant, a firm,belonging to the Dalamal Family had no authority to enter into any contract on behalf of the Defendant No.1 Company. The Defendant No.3, who happened to be one of the Directors of the Defendant No.1 Company, had also no right or authority to enter into such transaction in the suit premises. As such, the contention of the Defendant No.1 Company is that the agreement is not binding on the Defendant No.1 Company. The 4th Defendant was only an employee of the 2nd Defendant who also did not have any legal authority to enter into such agreement. They also contend that the 5th

Defendant was Director of the Defendant No.1 who had also did not have authority to bind the Defendant No.1 Company. Therefore, the Defendant No.1 Company contends that it is not bound by any of the commitments if at all given by them to the Plaintiffs.

10. The Defendant No.1 Company also contended that the Company has not received any money from the Plaintiffs being part of the consideration as alleged by the Plaintiffs who have paid to the 5th Defendant and, therefore, the same cannot be recovered from the Defendant No.1. The Defendant No.1 Company specifically denied any such agreement having been entered into and the agreement having been concluded for sale of the property for the consideration of Rs.8,85,000/-. As such, they claimed dismissal of the suit.

11. The Defendant No.2 has resisted the suit by independent Written Statement dated 22.4.1980. The Defendant No.2 firm, in short, contends that it did not and could not have any privity of contract with the Plaintiffs and the Defendant No.1 Company. The alleged negotiation which took place with the Plaintiffs is also denied. They, therefore, claimed dismissal of the suit.

12. The Defendant No.3 resisted the suit by his independent Written Statement dated 22.4.1980. He contends that he has no knowledge of either the negotiation or the concluded agreement having been arrived at with the Plaintiffs dated 30.11.1977 as alleged by the Plaintiffs. He contends that on 30.11.1977, he was out of India and, as such, could not have attended the meeting as alleged by the Plaintiffs. He further contends that he is not owner of the suit premises and, therefore, there was no question of negotiating the suit agreement with the Plaintiffs. He also denied to have received any Bank draft being handed over to him by the Plaintiffs on 3.1.1978. As such, he claimed dismissal of the suit.

13. The Defendant No.4 has also resisted the suit by his Written Statement dated 22.4.1980. is contention, in short, is of total denial of any suit agreement having been entered into with the Plaintiffs.

14. The Defendant No.5 has expired. He has not filed any written statement.

15. In view of these pleadings, the following issues are framed against which I have recorded the findings for the reasons stated below :-

ISSUES	FINDINGS
1. Whether plaintiffs' firm is registered under the Indian Partnership Act ? If not what is its effect ?	In the affirmative.
2. Do plaintiffs prove that there was a concluded contract of sale of the suit property for Rs.8,85,000/- as stated in paragraph 3 of the plaint?	In the negative.
3. Do they prove to have paid Rs.2 lakhs on 30.11.1977 to defendant No.5 ?	In the negative
4. Do they prove payment of Rs.1 lakh on 29.12.1977 and further sum of Rs.1 lakh on 3.1.1978 to defendant No.5 towards the suit transaction?	In the negative
5. Do they further prove payment of Rs.75,000/- and Rs.2,25,000/- to defendant No.5 as stated in para 6 of the plaint ?	In the negative.
6. Do they prove that defendants committed breach of the contract to sell as alleged in para 13 of the plaint ?	In the negative.
7. Do they prove that they were ready and willing to perform their part of the contract ?	In the negative.
8. Whether plaintiffs prove that defendants No.3 to 5 were authorirized by defendant no.1 to enter into an agreement and commit various acts and therefore, the agreement is binding upon defendant No.1 ?	In the negative.
9. Are plaintiffs entitled to specific performance of the contract ?	In the negative

10.	If not, are they entitled to refund of Rs.10,20,400/- and from which defendant ?	In the negative.
11.	Are they entitled to creation of the charge of this amount over the suit property ?	In the negative.
12.	What decree or order ?	Suit is dismissed with no order as to costs.

ISSUE NO.1 :-

16. With regard to this issue, the Plaintiffs have produced the Registration Certificate showing that the Plaintiff-firm is duly registered with the Registrar of Firms. It is at Exhibit "P-1". This issue, therefore, shall have to be answered in the affirmative.

ISSUE NOS.2,3,4,5 & 8 :-

17. I propose to discuss all these issues together as they are inter-related.

18. As alleged by the Plaintiffs, the contract of sale of the suit premises was oral. In this regard, the Plaintiffs have examined one of their partners, Harishlal Bhatia (PW-1) and R.T.Sharma (PW-2) who allegedly was present at the time of negotiations as also at the time of payment of earnest money of Rs.2,00,000/- on 30.11.1977 and Rs.1,00,000/- on 28th/29th November, 1977 in cash.

19. Harishlal Bhatia (PW-1) states that some time in November, 1977, they learnt about the intention of the Defendant No.1 Company to sell the suit premises. As the Plaintiffs were in need of such suit premises which is godown premises for the purpose of their business, the partners of the Plaintiffs, viz. he himself and Manoharlal approached Defendants Nos. 2, 3 and 4. As stated earlier, Defendant No.2 is a partnership firm. Defendant No.3 is the Director of the Defendant No.1 Company as well as partner of Defendant No.2 firm. Defendant No.4 is the Manager of Defendant No.2 firm. At this stage, it is to be noted that there is no dispute that the suit premises belong to the Defendant no.1 Company and the Defendant No.2 firm had no concern with the suit premises.

20. Harishlal (PW-1) further states that when he approached the Defendants Nos. 2, 3 and 4, the Defendants Nos. 3 and 4 expressed their readiness and willingness to sell the suit premises to the Plaintiff-firm. However, they

requested him to meet Defendant No.5, Director of the Defendant No.1 Company for the purpose of finalising the terms and conditions of the sale. He further states that as the Defendant Nos. 3 and 4 are asking to meet the defendant No.5 being the Director of the defendant No.1 for finalising the terms, he believed that the Defendant No.5 was authorised by the defendant No.1 Company for the said purpose. Then he adds in his evidence that on 30.11.1977, a meeting was held in the office of the Defendants Nos. 1 and 2 (the common office for the Company and the firm). The meeting was attended by himself, his partner, Manoharlal and the Defendants Nos. 3, 4 and 5 and R.T.Sharma (PW-2) who was then Accountant of the Defendant No.2 firm. He further states that after certain negotiations, a concluded agreement was arrived at between the two partners of the Plaintiff-firm and the Defendants Nos. 3, 4 and 5 representing the Defendants Nos. 1 and 2 wherein the Defendant No.1 agreed to sell the suit premises to the Plaintiff-firm for a consideration of Rs.8,85,000/-. He states that it was also agreed to pay an amount of Rs.3,00,000/- by way of earnest money and the rest of the consideration was agreed to be paid at the time of execution of the agreement of sale. He further states that it was agreed that the Defendants Nos. 3, 4 and 5 would obtain No Objection from the Co-operative Society for sale of the suit premises to the Plaintiffs. The Plaintiffs' witness, R.T.Sharma (PW-2) also confirms about this agreement having been arrived at.

21. Harishlal further states that immediately after the agreement was arrived at, the amount of Rs.2,00,000/- was paid in cash to the Defendant No.5. He further states that the amount of Rs.1,00,000/- was paid to the defendant No.5 on 29.12.1977 in the presence of the Defendant No.4 and R.T.Sharma (PW-2). R.T.Sharma (PW-2) also confirms this version of the Plaintiffs' witness, Harishlal (PW-1).

22. Harishlal (PW-1) further stated that the Defendant No.5 had represented to him that the Defendant No.1 Company had approached the Co-operative Society and the Chairman of the Society had agreed to issue the No Objection Certificate. Having said so, the Defendants Nos. 3, 4 and 5 demanded further sum of Rs.1,00,000/- which the Plaintiff-firm paid by way of Bank draft of Rs.1,00,000/- dated 3.1.1978, the xerox copy of which is produced on record. Subsequently, however, in February, 1978, the Defendant No.5 informed him that the suit premises was not capable of being used for the purpose of godown as under the Municipal Rules it could be used only for the purpose of parking of vehicles. However, further assurance was given by the Defendant No.5 in a meeting held in February, 1978 which was attended by the Defendants' Counsel, Mr. Merchant, that they would convince the Municipal Corporation to allow to use the premises as godown. He further states that Defendant No.5 did not encash the Bank draft and returned the same to him saying that it will not be

proper for him to encash the Bank draft before getting clearance from the Municipal Corporation. He further states that in October, 1978, the Defendant No.5 contacted him and represented to him that the transfer of the premises could be made at any time and he should keep balance of consideration ready. He further states that accordingly, he issued two Bank drafts, one for Rs.75,000/- and another for Rs.2,25,000/- both dated 30.10.1978 and handed over the same to Defendant No.5. Subsequently, however, Defendant no.5 fell ill and those Bank drafts also could not be encashed and they were got cancelled by the Plaintiffs. Then it is stated by Harishlal (PW-1) in December, 1978, the Defendant No.5 started attending the office and when he contacted the Defendant no.5, the defendant no.5 told him that there were large amounts of dues payable to the Municipal Corporation on account of Municipal taxes and other charges and said that the Plaintiffs could retain the sum of Rs.3,00,000/- from the balance consideration and make payment of the remaining amount. However, they issued six cheques on different dates between 20th December 1978 and 27th December, 1978 total value of Rs.5,85,000/- equal to the balance consideration and handed them over to the Defendant No.5. The Defendant no.5 however, did not encash those cheques. He further states ultimately when he found that the Defendant No.1 Company had omitted to take any steps to complete the sale of the suit premises, he issued the notice dated 29.6.1979 demanding refund of earnest money of Rs.3,00,000/-. He states that the

Defendant No.1 did not reply the said notice at all.

23. The evidence of R.T.Sharma shows that he supported the evidence of Harishlal with regard to the agreement and the payment of Rs.3,00,000/- by way of earnest money.

24. As against this, the Defendants have examined Ram Narayan Baheti (DW-1), the Chartered Accountant, employed in the Defendant No.1 Company to state that the Defendant Nos. 2 to 5 did not have any authority from or on behalf of the Defendant No.1 Company to enter into an agreement of sale of the suit premises which belong to the Defendant No.1 Company. He states that no resolution either in the meting of the Board of Directors or in the Annual General Body meeting was ever passed either to sell the suit premises or to authorise the defendants Nos. 2 to 5 to sell the suit premises to the Plaintiffs. He also states that no consideration of Rs.3,00,000/- was ever received as alleged by the Plaintiffs.

25. During the course of argument, it was stated on behalf of the Plaintiffs that the Defendant No.5 has expired and no further steps in that regard have been taken. Therefore, Defendant No.5 could not be examined by the Defendants. As a matter of fact, neither Defendant No.3 nor Defendant No.4 has been examined to refute the transaction agreement.

26. When it is an admitted position that the suit premises belong to the Defendant No.1 Company, it is necessary to see whether the Defendants Nos.3, 4 and 5 as also the Defendant No.2 firm for that matter had any authority to enter into an agreement of sale of the suit premises belonging to the Defendant No.1 Company. Defendant No.2 is a firm. Therefore, it is not legal entity. Defendant No.4 was an employee of the Defendant No.2 firm who is not concerned with the Defendant No.1 Company at all. Defendant No.3 is one of the Directors of the Defendant No.1 Company as also the Defendant No.5 is one of the Directors of the Defendant No.1 Company. The question is whether these Directors have an authority to enter into such transaction or sale of the premises belonging to the Defendant No.1 Company. In this regard, the Defendant No.1 has produced on record the Minute Books of the Board Meetings as well as the Annual General Meetings held during the relevant period of 30.11.1977. to show that no such resolution ever was passed either in the Board Meeting or in the Annual General Meeting of the Defendant No.1 Company to sell the suit premises or to authorise the Defendants Nos. 3 and 5 to enter into an agreement for sale of the suit premises to the Plaintiff-firm.

27. All that pleaded in the Plaint as also brought in the evidence of Harishlal Bhatia, is that since the Defendants Nos. 3 and 4 asked Harishlal Bhatia and his partner,

Manoharlal to meet Defendant No.5 for finalising the agreement to sell the suit premises to the Plaintiff-firm; that the two partners of the Plaintiff-firm believed that the Defendant No.5 who was the Director of the Defendant No.1 Company had an authority to sell the suit premises belonging to the Defendant No.1 Company. What is to be noted is that Harishlal (PW-1) and his partner Manoharlal have not stated that Defendant No.5 also represented to them that he had an authority to enter into transaction of sale of the suit premises. Both partners had acted on a representation made to them by Defendants Nos. 3 and 4. In this regard, I would deal little later with the aspect of payment having been made by the Plaintiffs and accepted by the Defendant No.5. That will have a bearing on the aspect of the Plaintiffs believing that the Defendant No.5 had an authority. I would deal with that aspect little later.

28. So far as the Plaintiffs believing Defendant No.5 had an authority there is no other basis except that it was told to them by Defendants Nos. 3 and 4 that the Plaintiffs should approach Defendant No.5 for the purpose of finalising the agreement. It is not the case of the Plaintiffs that P.W.1 states that the defendants Nos. 3 and 4 told that the Defendant No.5 had an authority to sell the suit premises belonging to the Defendant No.1 Company, there is no evidence to show that the Defendant No.5 represented to the Plaintiffs' partners

that the former had an authority to sell the suit premises for and on behalf of the Defendant No.1 Company.

29. In this regard, the learned Counsel for the Plaintiffs vehemently relied on the clauses of the Memorandum and Articles of Association to submit that the Defendants Nos. 3 and 5, being the Directors of the Defendant No.1 Company, could enter into such transaction of sale of the Company's property on behalf of the Company. He brought to my notice clause 22 of the Memorandum of Association and clauses 34, 35, 36, 37, 64, 71 and 72 of the Articles of Association. He submitted that as per clause 22 of the Memorandum of Association,the Company could dispose of its property for shares, cash, stock, debentures, etc. In his submission, therefore, the Defendants Nos. 3 and 5 could sell the Company's property for cash. There should be no dispute about this proposition as there could be cash transaction. However, the question is whether this could be done by the Defendants Nos. 3 and 5 without the authority from the Company. It is needless to say that there has to be authority for disposal of the property of the Company and that authority they could have by resolution passed in General Meeting or resolution passed in Board Meeting. By conjoint reading of clauses 34, 35, 36 and 37, he

tried to submit that the two Directors, viz. the Defendants Nos. 3 and 5 could call a Board Meeting and such meeting could be held even without prior notice or by a shorter notice and, therefore, the meeting which was held on 30.11.1977 at which the defendants Nos. 3 and 5 were present constituted a meeting of the Board of Directors and thereby Defendants Nos. 3 and 5 got an authority to dispose of the Company's property. However, this submission is not acceptable. Clause 35 speaks about quorum for the General Meeting of the Company providing that 2 or more entitled to vote and present in person shall be quorum for a general meting. Clause 36 provides that such meeting could be convened by shorter notice than 21 days or without notice as the members may approve. However, such a meeting without notice has to be with the approval of the members and with the consent of all the members entitled to receive notice of a meeting. The shareholders were the members and they were four - two from Melwani Family and two from the Dalamal Family. There is nothing to indicate that the meeting held on 30.11.77 was with the approval and consent of all the four members. Clause 37 speaks that the meeting will not be invalidated if there is accidental omission to give notice to any of the shareholders or the non-receipt of such notice. However, there is no question of accidental omission in the present case. At any rate, as prescribed in clause

36, the meeting could be convened validly only with the consent and approval of all the members. Therefore, these clauses will not support the argument advanced on behalf of the Plaintiffs. Clause 64 speaks of quorum of the Board meeting where it should be attended by two Directors or one-third of the total strength whichever is higher. As there were only four Directors, two of them had the quorum. However, this also does not help the Plaintiffs as there is nothing to indicate that the meeting was convened with the consent and approval of all the members and that there was no approval by way of resolution passed by the Defendant No.1 Company to sell the property and authorising the Defendants Nos. 3 and 5 to have such sale of the property. Clause 68 speaks of resolution being valid without Board Meeting. It speaks of a resolution having been passed at a meeting of the Directors or of the committee thereof duly called and constituted. Here there is nothing to indicate that meeting of the Defendants Nos. 3 and 5 was duly called and constituted and any resolution having been passed as the meeting was held on 30.11.1977. Under these circumstances, I do not find any merit in the submission made on behalf of the Plaintiffs that the Defendants Nos. 3 and 5 had due authority from the Defendant No.1 Company by way of resolution passed either in the General Body Meeting or in the meeting of the Board of Directors authorising

them to sell the property of the Company.

30. In this regard, it is further to be noted that admittedly, the business of the Defendant No.1 Company was as manufacturer of Electrodes and other allied articles. If such articles were involved in the sale, the approval of the Defendant No.1 Company would not have been necessary. However, it is clear that the business of the Company is not to sell its own property, viz. the suit premises. Therefore, if the Company's property was to be sold, it must have been sold with due approval and authority of the Defendant No.1 Company which could be given by a resolution passed either in the General Body Meeting or in the Board of Directors' Meeting. No such resolution has been passed. Under these circumstances, even if it is assumed to have been proved that there were some talks between the two partners of the Plaintiff-firm and the Defendants Nos. 3 to 5 with regard to the sale of the suit property fixing the consideration of Rs.8,85,000/-, that cannot be said to be a concluded contract As such an act done by the Defendants Nos. 3 and 5 cannot be said to be with authority of the Defendant No.1 Company and such act should have been got ratified by the Defendant No.1 Company by a suitable resolution passed by it either in the General Body Meeting or in the meeting of the Board of

Directors.

31. To see whether there was really a concluded contract, the fact of payment of Rs.3,00,000/- by way of earnest money would corroborate that aspect. However, at the outset, it should be mentioned that the payment of earnest money of Rs.3,00,000/- i.e. Rs.2,00,000/- on 30.11.1977 and Rs.1,00,000/- on 29.12.1977 is not established. In this regard, although Harishlal (PW-1) and the witness- R.T.Sharma (PW-2) have stated about such payment having been made, their evidence is not reliable. This is so because, Harishlal (PW-1) has admitted in cross-examination that the purchase of the suit property was by the firm and, therefore, the firm was liable to make payment. He however, adds that he does not remember exact amount paid by the firm. He only states that cash amount of Rs.2,00,000/- was paid by the partners on 30.11.1977 on behalf of the firm. He then admits that during the course of the business of the partnership firm, they used to make payment mostly by cheques. There is no reason why the payment of Rs.2,00,000/- made on 30.11.1977 or Rs.1,00,000/- made on 29.12.1977 was required to be made in cash and not by cheque as was the practice followed. He further states in the cross-examination that sometimes they used to receive cash payment, but used to issue invoices. Even so, he

admits that they did not get any receipt or invoice for the payment of Rs.2,00,000/- made by them in cash. There is no plausible reason for not having receipt thereof. Similar is the case in respect of the alleged payment of Rs.1,00,000/- made on 29.12.1977. He further admits in cross-examination that the firm maintains purchase book, sale book, ledger, etc. When confronted with the payment being made from the firm's account, he states that he did not know how the entry with regard to payment made by the partner on behalf of the firm is recorded. He further states that whenever the partners had made payment on behalf of the firm, such payment is reimbursed to the partner by the firm. If this is so, there must have been accounting made in the accounts of the firm in respect of the aforesaid two cash payments allegedly made. He further states that such transaction of reimbursement would be reflected in the firm's account and so also the transaction of payment of Rs.2,00,000/- and Rs.1,00,000/- made by the partners for and on behalf of the firm must reflect in the firm's account for being reimbursed to the partners. When it is an admitted position that the firm was maintaining accounts and the witness also admits, there must be entry with regard to the payment in the firm's account, such accounts should have been produced and which should have been important and prime evidence to show these two payments having

been made in cash by the firm or on behalf of the firm. The reason for not taking receipts for those two payments as assigned by Harishlal is that they had earlier bought two properties from the Defendants. There is no dispute that the Plaintiffs had bought two properties. However, those properties were bought by proper documentation and there was no case of cash payment having been made. If this was so, there should have been some special reason to make cash payment without having any receipt and there is no such reason assigned. On the contrary, when the earlier transactions were with proper documentation, the present transaction should also have been with proper documentation, atleast a receipt for the two payments made. Admittedly, both partners of the Plaintiff-firm are businessmen and it is beyond comprehention that they would make such a large payments of Rs.2,00,000/- and Rs.1,00,000/- in cash without any documentary evidence. Moreover, for about a year, the transaction was not materialised. Therefore, in normal course of conduct, a businessman like the Plaintiffs, would have put on record the agreement as well as the two payments made in cash by writing letter to the Defendant No.1 Company or a letter written to the Chairman of the Co-operative Society for getting No Objection. However, nothing of the sort was done. It is pertinent to note that at one point of time, as alleged by the

Plaintiffs, the Defendant No.5 had expressed uncertainty about finalisation of the transaction as the Municipal Corporation was not allowing space to be utilised as godown, but the space to be utilised only for vehicle parking. It was expected that the Plaintiffs should have put on record the agreement and particularly the two payments made.

32. As regards the evidence of R.T.Sharma, it is apparent that he was required to get the affidavit dated 7.11.1979 affirmed before the Magistrate incorporating the agreement as well as the two payments. There is no explanation coming on record as to why this affidavit was required to be made and for producing where. As regards payments, the evidence of this witness is not believable as he had actually not counted the cash. At any rate, under the circumstances, this witness is trying to help the Plaintiffs for the reasons best known to him. Under these circumstances, the Plaintiffs have not proved the payment of Rs.2,00,000/- and Rs.1,00,000/- totalling Rs.3,00,000/- by way of earnest money.

33. Harishlal further states that as demanded by the Defendant No.5, a demand draft of Rs.1,00,000/- was given to the Defendant No.5 on 3.1.1978. Similarly, according to him, the same was returned by the

Defendant No.5 because it was represented to him that probably the Municipal Corporation may not permit the use of the suit premises as godown as as per the Rules, the same could be used only for vehicle parking. Only xerox copy of this demand draft is produced. After the demand draft was returned, the same was got cancelled. However, there is no contemporary documentary evidence though available have been produced. It is again not palatable that such draft would have been handed over by P.W.1 to the Defendant No.5 without obtaining any acknowledgment thereof. If the draft was cancelled, the Plaintiffs could have produced documentary evidence from the Bank, but nothing has been produced. Under these circumstances, even tender of those Rs.1,00,000/- cannot be believed. The xerox copy of the demand draft is not admitted in evidence.

34. Similar is the case with regard to the issuance of two demand drafts, one for Rs.75,000/- and another for Rs.2,25,000/- totalling Rs.3,00,000/- having been handed over to the Defendant No.5 on 30.10.1978 towards part of the consideration. Only xerox copies of these documents are produced. They are not admitted in evidence. There is no contemporary documentary evidence. Again there was no acknowledgment taken about handing over these drafts to the Defendant no.5. These drafts were also returned and no contemporary

evidence which could have been available from the Bank is produced.

35 Lastly, Harishlal states that on demand made by the Defendant No.5, he handed over those cheques to the Defendant No.5 totally worth Rs.5,85,000/- as per the details given in Exhibit "E" annexed to the Plaint. Five cheques were each of Rs.1,00,000/- and the sixth cheque was for Rs.85,000/-. The cheque numbers are given and the dates of the cheques are given. Four cheques dated 20.12.1978 and the two cheques dated 27.12.1978. No counter-foils of these cheques are produced nor was there any acknowledgment about handing over of these cheques to the Defendant No.5 obtained. Even the statement at Exhibit "E" annexed to the Plaint is not admitted in evidence and, therefore, the same cannot be relied upon. It is undisputed that none of the cheques was encashed. As such, even this tender cannot be relied on.

36. Certain legal submissions were tried to be made with regard to the Defendants Nos. 3 and 5 having authority to enter into a transaction regarding sale of the suit premises and certain authorities cited to submit that there was an ostensible authority to the Defendant No.5. I do not find it necessary to go into all these details. As a matter of fact, as discussed

above, the Plaintiffs had failed to prove that such a concluded contract for sale of the suit premises was made. The entire evidence is one-sided and all oral. Even with regard to the payment of large sum of Rs.3,00,000/- was in cash without any acknowledgment thereof. Such a transaction entered into by the businessmen like the Plaintiff-firm and its partners is not at all believable.

37. As regards the payment, P.W.1 has admitted that the Plaintiff-firm was maintaining account books, but no such account books were produced. The best evidence in this regard would have been the account books which was required to be maintained regularly in the course of the business by the Plaintiff-firm. That would lead to an adverse inference drawn under Section 114 of the Evidence Act that if accounts were produced, that would not have supported the case of the Plaintiffs with regard to the payment. Even for that reason the evidence in that regard cannot be relied upon. Under these circumstances, the issue Nos. 2,3, 4, 5 and 8 are answered in the negative.

ISSUE NOS. 6 & 7. :

38. As discussed above, the tender of Rs.1,00,000/-, Rs.75,000/-, Rs.2,25,000/- and the total

sum of Rs.5,85,000/- by cheques has not been established. Therefore, in case for the sake of argument, it is held to be a concluded contract, the Plaintiffs were not ready and willing to perform their part of the contract. This is evident from the notice issued by them to the Defendants on 29.6.1979 which is produced at Exhibit "P-3". By this notice, in clear words, the Plaintiffs had repudiated the contract and made demand of refund of Rs.3,00,000/-. According to the evidence of Harishlal, Defendant No.5 had failed to obtain the No Objection from the Society for sale of the suit premises. This had happened between January 1978 and December 1978. At no point of time, the Plaintiffs had issued any notice to the Defendants requiring them to perform their part of the contract i.e. to require them to obtain No Objection Certificate from the Chairman of the Co-operative Society. That also indicates that the Plaintiffs were not ready and willing to perform their part of the contract. The letter, Exhibit "P-3", also does not mention that the Plaintiffs had indicated that they were ready and willing to perform their part of the contract. All that stated was that there was scores of meeting with Defendant No.5 for possession, but evasive replies were given and, therefore, they had no alternative but to ask for refund of Rs.3,00,000/-. The letter does not call upon the Defendant no.5 to

whom the letter is addressed or the Defendant no.1 for that matter to perform their part of the contract of getting No Objection Certificate nor does the letter indicate that they were ready and willing to pay part of the consideration. Under the circumstances, the Plaintiffs cannot be held to be ready and willing to perform their part of the contract in case a view is taken that there was a concluded contract which, in fact, is not, as discussed above. Under the above circumstances, there is no question of defendants having committed breach of the contract. Therefore, the Issue Nos. 6 and 7 can be answered in the negative.

ISSUE NO. 9 :-

39. In the aforesaid circumstances, there is no question of the Plaintiffs being entitled to the specific performance of the contract as there was no concluded contract. However, in case of different view of the matter, the Plaintiffs themselves had repudiated the contract by notice dated 29.6.1979, Exhibit "P-3" and, therefore, they are not entitled to the specific performance of the contract. This issue shall have to be answered in the negative.

ISSUE NO. 10 :-

40. As discussed above, the Plaintiffs have failed to prove that they had paid the earnest amount of Rs.3,00,000/-. Therefore, they are not entitled to refund of the said amount with damages and interest as claimed. In case of different view of the matter, if it is held that the amount was paid towards earnest money of the concluded contract, with a view to completely deciding the suit, I record my finding with regard to the amount payable to the Plaintiffs. The Plaintiffs have not led any evidence as to the damages they suffered. Therefore, on account of damages, they would not be entitled to any amount. They would be entitled to refund of Rs.3,00,000/- with interest thereon at the rate of 6% per annum from the date of the suit till payment. This issue is, therefore, answered in the negative.

ISSUE NO. 11 :-

41. In view of the aforesaid findings, this issue does not survive as the Plaintiffs are not entitled to creation of the charge over the suit property. Hence, this issue is answered in the negative.

Hence, the Suit is dismissed with no order as to costs.

(S.K.SHAH,J.)